No. 12396

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WARREN H. PILLSBURY,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, *et al.*,

Appellees.

PETITION FOR REHEARING.

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Come now the appellees and respectfully petition the court for a rehearing.

The Opinion of the Court was filed May 26, 1950.

This petition is filed under Rule 25 of this Court. In the judgment of counsel it is well founded and it is not interposed for delay.

Discussion of Opinion.

The opinion makes two basic errors, in counsel's opinion:

First, it misstates the appellees' contention as to the meaning of Section 14(m) of the Longshoremen's Act (33 U. S. C. 914m). The Court takes the appellant's view as to our position, rather than our own.

Second, it relies primarily on the *res judicata* basis, which is not apposite for many reasons.

I.

Appellees' Contention Is Misstated in Opinion and Our True View Is Not Mentioned by the Court.

The Court states appellees' contention to be that no employee may recover more than $7,500 under the law, no matter how many successive accidents or injuries or disabilities he suffers, using the example of an employee who recovered $7,500 for partial disability and later lost both legs after returning to employment. This mistake no doubt came from the Court's assumption that the Government had not misstated our position (see Brief for Appellant p. 23, par. 1).

Our point of view, as clearly stated in oral argument, is that the Act grants awards only for *disability* or death (33 U. S. C. 903a). No award is granted for mere injury or because of an accident. Hence, the word *injury* in 33 U. S. C. 914(m) must be read as "disability" or as "disability resulting from injury." Otherwise there is no statutory limit to awards for "disability" but only upon awards for death. A statute is to be construed so that it will not be rendered meaningless.

> *Market Co. v. Hoffman* (1879), 101 U. S. 112, 115, 25 L. Ed. 782.

The facts here disclose, as a matter of law, only one disability, caused by two successive accidents which occurred during two separate employments. The Commissioner so held and required the two employers to share the liability for the medical care [R. 27, 50] and for the maximum weekly benefit of $25.00 [R. 27, 50]. If there is more than one *disability* the Commissioner

should have given $50.00 a week award in this case, as the statutory limit on weekly award is clearly a limit on each disability (33 U. S. C. 906, see 10 F. C. A. p. 267, and Note, Supp. p. 45).

The Commissioner's refusal to terminate the weekly awards upon a showing that the $7,500 maximum had been paid [R. 37, 57] was an act in excess of his jurisdiction, if our contention is correct as to the meaning of 33 U. S. C. 914(m).

The Court's opinion as to the meaning of the section is fatally defective in that it inserts the word "employer" in the singular and in that it fails to distinguish between a *disability* and an *injury*. No award is ever made for *an injury,* only for a disability.

Here, the man's disability clearly resulted from a singular physical condition jointly caused by two accidents [R. 48].

We do not contend that if an employee, say Mr. Laird, has recovered the $7,500 maximum, and he returns to work for the same or another employer, he is without statutory protection. *No such point is involved in this case.* If Laird returned to work and lost a leg, he could get up to $7,500 more, under the law as it existed in 1942. If he had an accident which re-aggravated his back condition, resulting in a new disability period, he could doubtless recover a new award therefor. We have certainly not asked the Court to hold otherwise. Any contrary holding in this case would be pure *dictum.*

II.

Res Judicata Rule Was Not Properly Raised and Is Clearly Inapplicable.

The opinion of the Court states that the 1942 awards are *res judicata.* No authority was cited by the Court for this holding.

Appellant did not raise any issue of res judicata in the 1948 hearing before himself as Commissioner. The orders denying termination of the awards were not based upon any such issue [R. 37-39, 57-59].

Moreover, no such issue was raised in the District Court [R. 6, 7]. Although the Points and Authorities filed by the Government in the trial court are not in the record, we have carefully reread them without finding any such point, except an incidental reference that the awards for "medical treatment" had long since become final [Reply Memo p. 3, line 21]. The trial judge's opinion, of course, does not deal with any such issue [R. 8-13].

The point was thus raised for the first time on appeal. It is elementary that such tardiness is fatal to the point:

> *Holmgren v. U. S.* (1910), 217 U. S. 509, 521, 30 S. Ct. 588, 54 L. Ed. 891, 19 Ann. Cas. 778;
>
> *Evenson v. Spaulding* (C. C. A. 9th 1907), 150 Fed. 517, 523, 9 L. R. A. (N. S.) 904;
>
> *Geo. R. Co. v. Redwine,* 85 Fed. Supp. 749.

Judgment Beyond Jurisdiction Never Becomes Res Judicata.

If the earlier awards could be construed to have covered the issue of maximum liability, they could never become *res judicata* because they would be in excess of jurisdiction. The Commissioner does not sit as a common law court of general jurisdiction with unlimited amounts to dispose of in his judgment.

St. Jos. Stockyards v. U. S. (1936), 298 U. S. 38, 56, 80 L .Ed. 1033;

Boundary County v. Wolden (C. C. A. 9th 1944), 144 F. 2d 17, 19.

If a California Municipal Court rendered a judgment for $5,000, which was not appealed, could it be held to be *res judicata,* in view of the statutory limit of $3,000?

Any administrative order, or even a judicial decision, in excess of jurisdiction is void and never becomes *res judicata.*

Piedmont Ry. Co. v. U. S. (1930), 280 U. S. 469, 478, 74 L. Ed. 551;

Hardin v. Jordan (1891), 140 U. S. 371, 400, 35 L. Ed. 428;

Aspden v. Nixon (1846), 4 How. 467, 11 L. Ed. 466;

St. Louis Co. v. Paramount Pictures (D. C. Mo. 1945), 61 Fed. Supp. 854; app. dism. 156 F. 2d 400; cert. den. 335 U. S. 854.

Res Judicata Applies Only to Issues Decided.

The 1942 awards in this case cannot be regarded as determinative of the question of the $7,500 maximum because that issue was not raised or involved [R. 22-27, 46-50]. Those original awards were merely for $12.50 per week "until the further order of the Deputy Commissioner" [R. 27, 50].

The termination because of having reached the $7,500 maximum was thus left open. The Commissioner treated the issue as open in the 1948 hearing and decision.

Gage v. Guner (1902), 136 Cal. 338, 346-347, 68 Pac. 710.

Also:

42 *Am. Jur.,* Public Adm. Law, Sec. 176.

Indeed, if the 1942 awards are final on the issue, then the $12.50 per week will go on forever, unless the Commissioner decides to terminate on reaching $15,000, because the *original awards mention no limit!*

The only kind of 1942 award which could have been fairly regarded as determining this issue would be one which stated explicitly that each employer was regarded as under obligation to pay $12.50 per week up to $7,500 maximum for each employer, or until disability ceased, whichever first occurred.

Roch T. Co. v. U. S. (1939), 307 U. S. 125, 143, 145, 83 L. Ed. 1147;

Note, 122 *A. L. R.* 600, 602;

Ross v. Beacham (D. C. S. Car.), 33 Fed. Supp. 3 ("precise question").

If the employers had gone to Court in 1942 on this issue, they would have been laughed out of Court. There would have been no exhaustion of the administrative remedies, since the order was subject to termination by its express terms [R. 27, 50].

42 *Am. Jur.* 580;

Empl. Liab. Corp. v. Matlock, 151 Kan. 293, 98 P. 2d 456, 127 A. L. R. 461.

An action in Court in 1942 would have been treated as fictitious, frivolous, and academic, since the disability might cease [R. 26-27] or the employee might die before the $7,500 joint limit would be reached. Hypothetical questions are not "cases or controversies" within the meaning of Article III of the U. S. Constitution.

Nashville Ry. v. Wallace (1933), 288 U. S. 249, 77 L. Ed. 730;

Elec. Co. v. S. E. C. (1938), 303 U. S. 419, 443, 82 L. Ed. 936, 115 A. L. R. 105;

Chicago Ry. Co. v. Wellman (1892), 143 U. S. 339, 36 L. Ed. 176.

Moreover, it would have been held that it would be presumed that the Commissioner would follow the law and issue an order of termination when the correct maximum was reached.

42 *Am. Jur.* 574;

Pac. Tel. Co. v. Seattle (1934), 291 U. S. 300, 304, 78 L. Ed. 810.

Again, if the 1942 awards are final *as to any issue,* are they not final as to the issues of *single disability* and of *apportionment of liability* for Mr. Laird's *disability?* For, those awards required these appellees to divide that liability 50-50 as for a single disability [R. 27, 50].

The basic principle of *Res Judicata* is to avoid litigation on issues already once determined.

> *C. I. R. v. Sunnan* (1948), 333 U. S. 591, 92 L. Ed. 898, 68 S. Ct. 715.

In this case if the first award is now construed retroactively to have covered the issue of whether the $7,500 maximum was to be joint or several, then the Court is encouraging needless litigation about hypothetical effects which administrative orders may have in the unforeseeable future. Thus *res judicata* would encourage litigation, instead of having the salutary effect of avoiding repetitious waste of public funds and time in redetermination of matters once fully settled on the merits.

An analogous case would be one in which a divorce decree awards $50 a month for support of a child "until further order of the court." If state law limits such awards to minor children, *is the husband under a duty to appeal at once to establish that the award will not be enforced when the maximum is reached* at the child's twenty-first birthday? Or would it not be "beyond the jurisdiction" of the Court to enforce the decree beyond the maximum? And is it not presumed that the Court would later obey the law and make a "further order" of termination when the jurisdictional limit is reached?

It seems obvious that an award of $50 a month "until further order" is not a passing on the issue of whether there is a maximum limit to the amount which can be collected.

> *Russell v. Place* (1876), 94 U. S. 606, 608, 24 L. Ed. 214 (S. C. Fed. Cas. No. 12,161).

Or, suppose, here, that appellees had stopped paying the award and gone to court testing the jurisdiction of appellant to enforce his award as *ultra vires?*

Danger to Commissioner's Power.

Indeed, if this Court's opinion should stand, there is grave danger that the Deputy Commissioner would lose all his power to modify awards, because his purported reservation of "until further order" will become a meaningless appendage to a final and conclusive judgment.

Moreover, as pointed out in the Brief for Appellees (p. 11), the claim of appellant was that the earlier finding was conclusive as to the question of a *single injury* versus *multiple injuries*. We challenged the appellant to cite any transcript reference where any such finding was located (Brief of Appellees p. 12). To date no such transcript reference has been produced. The Court's opinion, likewise, does not purport to cite or quote any such finding from the record. The answer, of course, is that there was no such determination, and this *res judicata* point is a last straw grabbed at by appellant, *for the first time on appeal, and without any reference to the record.*

The Court's attention is further directed to the fact that the Brief for Appellant raises the issue as one of jurisdiction of the District Court in San Francisco. The jurisdiction, conferred by statute, is indisputable. Even if the District Court had decided the case erroneously *because the Government failed to plead res judicata,* the court below would still have had jurisdiction. And even if *res judicata* had been pleaded, it would have been meaningless for the reasons already stated: if $7,500 is the true jurisdictional limit on the commission, any purported award in excess thereof would be void and could never become *res judicata;* if, on the other hand, $7,500 is not the true limit, then the order sought to be enjoined would be valid. In other words, this case could not be disposed of except

by deciding the merits, and the merits would completely control the case, without any necessity of going further into the unraised issue of *res judicata.*

Conclusion.

It is respectfully submitted that a rehearing is indicated in this matter on the many grounds above argued, and particularly because

(1) the opinion inadvertently mistakes appellees' contentions, and fails to deal with appellees' actual position in the matter;

(2) the opinion overlooks the fact that *res judicata* was not raised until the appellate stage;

(3) the opinion fails to cite any precedents on *res judicata* and appears to be out of harmony with the established case law that a decision beyond jurisdictional limits is void and never becomes *res judicata,* that one *res judicata* rule applies only to issues decided in the earlier case, that the form of the earlier awards left the duration of the payments open to "further order," that the Commissioner passed on the issue as one which was still open to his control, and that any appeal to the courts in 1942 would have been obviously frivolous and hypothetical, since no one knew how long the disability would last or whether the employee would live long enough to collect the maximum award.

Wherefore, appellees pray for a rehearing and for an order affirming the judgment below.

TIPTON & WEINGAND,
By CLAUDE F. WEINGAND.
Attorneys for Appellees.

Certification.

We certify that the within petition for rehearing is, in our judgment, well founded and that it is not interposed for delay.

TIPTON & WEINGAND,
By CLAUDE F. WEINGAND.